Bank Bumiputra Malaysia Bhd & Ors v Safuan Holdings Sdn Bhd & Ors (Allied Bank Malaysia Bhd, intervener)

HIGH COURT (KUALA LUMPUR) — EXECUTION NO 36–16 OF 2004
NALLINI PATHMANATHAN JC
2 OCTOBER 2009

Civil Procedure — Judgment and orders — Prohibitory order — Application by intervener to set aside order — Whether intervener's equitable interest or rights as equitable chargee prevailed over plaintiffs' interest — Whether second defendant judgment debtor was divested of his beneficial ownership of land — National Land Code ss 336 & 344 — Rules of the High Court 1980 O 47 r 6(1)

Civil Procedure — Interest — Execution after six years — Whether arrears of interest to be claimed may be limited by court — Limitation Act 1953 s 6(3)

Land Law — Restraint on dealings — Prohibitory order — Application by intervener to set aside order — Whether intervener's equitable interest or rights as equitable chargee prevailed over plaintiffs' interest — Whether second defendant judgment debtor divested of his beneficial ownership of land — National Land Code ss 336 & 344 — Rules of the High Court 1980 O 47 r 6(1)

On 4 February 1991, the plaintiffs entered into a consent judgment with Mat @ Matshah bin Ahmad @ Sapuan, the second defendant in this action. Thereafter, on 12 November 2003, the plaintiffs obtained leave to execute the judgment out of time as six years had lapsed from the date of the judgment. On 21 November 2003, the second defendant entered into a sale and purchase agreement ('the SPA') to sell his property known as Lot 363A and another piece of land known as Lot 363B to one Mohd Faizal bin Matshah ('Faizal') for RM1.5m. Faizal paid RM500,000 towards the purchase price. The Allied Bank Malaysia Bhd ('the intervener') granted Faizal the loan to finance the purchase of the two lots. However, it was a condition precedent of the loan that Lots 363A and 363B would be charged to the intervener as security. In the meantime, the plaintiffs had applied for and obtained a prohibitory order over Lot 363A on 4 November 2004. The prohibitory order was registered by the plaintiffs on 10 November 2004. The intervener then proceeded to lodge a private caveat over Lot 363A and on 23 December 2004 executed a memorandum of transfer in respect of Lots 363A and 363B

in favour of Faizal. On 19 April 2006, the plaintiffs filed a summons for direction in the present proceedings for an order to sell Lot 363A which had yet to be disposed off. On 6 June 2006 the intervener discovered the order registered against Lot 363A by the plaintiffs. It then filed the instant application to intervene in these proceedings and set aside the prohibitory order dated 4 November 2004. The intervener submitted, citing s 344 of the National Land Code ('NLC'), that the prohibitory order ought to be set aside as the plaintiffs' interest did not prevail over the intervener's equitable interest or rights as an equitable chargee. The intervener also submitted that as the SPA between the second defendant and Faizal was executed on 21 November 2003, almost one year before the prohibitory order dated 4 November 2004, Faizal acquired an equitable interest over Lot 363A which was not lost by reason of the prohibitory order, which came later. The intervener also argued that the plaintiffs could not sell Lot 363A as the second defendant had divested himself of all beneficial interest in Lot 363A when he received the RM800,000 from Faizal and executed the memorandum of transfer. The plaintiffs on the other hand maintained that the prohibitory order ought not to be set aside as no equitable charge existed in favour of the intervener. It was the plaintiffs' contention that Faizal was not in a position to charge Lot 363A because after the registration of the prohibitory order on 10 November 2004 no equitable charge could arise under O 47 r 6(1) of the Rules of the High Court 1980 ('the RHC'). The plaintiffs further submitted that Lot 363A could be transferred from the second defendant to Faizal only upon completion of the sale and the sale had not been completed. The main issue for determination in this case was whether Faizal had acquired an equitable interest in Lot 363A which enabled him to create a valid and equitable charge in favour of the intervener.

Held, dismissing the application with costs:

(1) It was evident from the case law that the second defendant would have been effectually divested of his beneficial ownership of Lot 363A upon full payment of the purchase price and the execution of the memorandum of transfer. The full purchase price was paid on 23 March 2005 and the memorandum of transfer was executed on 23 December 2004. However, the prohibitory order was registered prior to both those dates, ie on 10 December 2004. As such, as of 10 November 2004, the second defendant was precluded from further dealing with Lot 363A by reason of the joint effect of s 336 of the NLC as well as the provisions of O 47 r 6(1) of the RHC. Thus, as at 10 November 2004 the second defendant had not been divested of his beneficial interest of Lot 363A because as of that date the full purchase price had not been paid and the memorandum of transfer had not been executed. If title remained with the second defendant, it could not pass to Faizal

after 10 November 2004 by reason of the prohibitory order. In the circumstances, no equitable charge could be created by Faizal in favour of the intervener as he could pass no better title than he himself possessed, and at that point in time he did not possess title to Lot 363A (see paras 14–18).

(2) There is a requirement under s 6(3) of the Limitation Act 1953 for leave of court to be obtained where execution is done after six years. In such an instance the arrears of interest to be claimed may be properly limited by the court. In the instant case the arrears of interest should be limited to six years as the judgment was executed after a lengthy period of more than 12 years. However, this in itself did not comprise sufficient basis to set aside the prohibitory order altogether (see para 26).

[Bahasa Malaysia summary

Pada 4 Februari 1991, plaintif-plaintif menandatangani penghakiman persetujuan dengan Mat @ Matshah bin Ahmad @ Sapuan, defendan kedua dalam tindakan ini. Kemudiannya, pada 12 November 2003, plaintif-plaintif mendapat kebenaran untuk melaksanakan penghakiman di luar had masa memandangkan enam tahun sudah berlalu dari tarikh penghakiman. Pada 21 November 2003, defendan kedua menandatangani perjanjian jual beli ('PJB') untuk menjual hartanahnya yang dikenali sebagai Lot 363A dan sebidang tanah lain yang dikenali sebagai Lot 363B kepada Mohd Faizal bin Matshah ('Faizal') untuk RM1.5m. Faizal membayar RM500,000 harga belian. Allied Bank Malaysia Bhd ('pencelah') memberikan pinjaman kepada Faizal untuk membiayai pembelian dua lot. Walau bagaimanapun, syarat duluan pinjaman bahawa Lot 363A dan 363B akan dicagarkan kepada pencelah sebagai jaminan. Pada waktu yang sama, plaintif-plaintif memohon untuk dan mendapatkan perintah larangan terhadap Lot 363A pada 4 November 2004. Perintah larangan didaftarkan oleh plaintif-plaintif pada 10 November 2004. Pencelah kemudiannya memasukkan kaveat persendirian terhadap Lot 363A dan pada 23 Disember 2004 menyempurnakan memorandum pindah milik berkenaan Lot 363A dan 363B bagi pihak Faizal. Pada 19 April 2006, plaintif-plaintif memfailkan saman untuk arahan dalam prosiding ini bagi mendapatkan perintah untuk menjual Lot 363A yang belum dijual. Pada 6 Jun 2006 pencelah mendapati perintah yang didaftarkan terhadap Lot 363A oleh plaintif-plaintif. Pencelah kemudiannya memfailkan permohonan ini untuk mencelah dalam prosiding-prosiding ini dan mengetepikan perintah larangan bertarikh 4 November 2004. Pencelah menghujah, dengan memetik s 344 Kanun Tanah Negara ('KTN'), bahawa perintah larangan seharusnya diketepikan memandangkan kepentingan plaintif-plaintif tidak mengatasi kepentingan ekuiti pencelah atau hak-hak sebagai pemegang gadaian ekuiti. Pencelah juga menghujah bahawa memandangkan PJB di antara defendan kedua dan Faizal dimeterai pada 21 November 2003, hampir setahun

sebelum perintah larangan bertarikh 4 November 2004, Faizal memperoleh kepentingan ekuiti terhadap Lot 363A yang tidak terhapus disebabkan perintah larangan yang didaftarkan kemudiannya. Pencelah juga mempertikaikan bahawa plaintif-plaintif tidak boleh menjual Lot 363A memandangkan defendan kedua telah melucutkan kesemua kepentingan benefisialnya dalam Lot 363A apabila dia menerima RM800,000 daripada Faizal dan menyempurnakan memorandum pindah milik. Sementara itu, plaintif-plaintif menegaskan bahawa perintah larangan tidak boleh diketepikan memandangkan tiada gadaian ekuiti wujud bagi pihak pencelah. Plaintif-plaintif menghujah bahawa Faizal tidak berhak untuk mencagarkan Lot 363A kerana selepas pendaftaran perintah larangan pada 10 November 2004 tiada gadaian ekuiti timbul di bawah A 47 k 6(1) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Plaintif-plaintif selanjutnya menghujah bahawa Lot 363A hanya boleh dipindahkan daripada defendan kedua kepada Faizal selepas selesai jualan dan jualan tersebut tidak diselesaikan. Isu utama untuk ditentukan dalam kes ini ialah sama ada Faizal memperoleh kepentingan ekuiti dalam Lot 363A yang membolehkannya membuat gadaian yang sah dan ekuiti bagi pihak pencelah.

Diputuskan, menolak permohonan dengan kos:

(1) Jelas daripada kes undang-undang bahawa defendan kedua telah melucutkan hak milik benefisialnya terhadap Lot 363A selepas membuat pembayaran penuh harga belian dan pelaksanaan memorandum pindah milik. Harga belian penuh dibayar pada 23 Mac 2005 dan memorandum pindah milik ditandatangani pada 23 Disember 2004. Walau bagaimanapun, perintah larangan didaftarkan sebelum kedua-dua tarikh tersebut, iaitu pada 10 Disember 2004. Oleh itu, pada 10 November 2004, defendan kedua dihalang daripada membuat urusan mengenai Lot 363A oleh sebab kesan bersama s 336 KTN begitu juga dengan peruntukan-peruntukan A 47 k 6(1) KMT. Oleh itu, pada 10 November 2004 defendan kedua tidak melucutkan kepentingan benefisialnya terhadap Lot 363A kerana pada tarikh tersebut harga belian penuh belum dibayar dan memorandum pindah milik belum disempurnakan. Sekiranya hak milik dipunyai oleh defendan kedua, maka ia tidak boleh diberikan kepada Faizal selepas 10 November 2004 disebabkan perintah larangan. Dalam keadaan ini, tiada gadaian ekuiti yang dijalankan oleh Faizal bagi pihak pencelah memandangkan dia tidak boleh memberikan hak milik yang lebih baik daripada yang dimilikinya dan pada masa tersebut dia tidak memperoleh hak milik kepada Lot 363A (lihat perenggan 14–18).

(2) Terdapat keperluan di bawah s 6(3) Akta Had Masa 1953 untuk kebenaran mahkamah perlu diperoleh di mana pelaksanaan dilakukan

selepas enam tahun. Dalam keadaan ini tunggakan faedah yang dituntut dihadkan oleh mahkamah. Dalam kes ini tunggakan faedah perlu dihadkan kepada enam tahun memandangkan penghakiman dilaksanakan selepas tempoh masa lebih daripada 12 tahun. Walau bagaimanapun, ini tidak mempunyai asas yang mencukupi untuk mengetepikan perintah larangan (lihat perenggan 26).]

Notes

For a case on prohibitory order, see 2(2) *Mallal's Digests* (4th Ed, 2007 Reissue) para 4211.

For cases on interest generally, see 2(2) *Mallal's Digests* (4th Ed, 2007 Reissue) paras 3584–3649.

For cases on prohibitory order, see 8 *Mallal's Digests* (4th Ed, 2006 Reissue) paras 3831–3841.

Cases referred to

Chua Hee Hung & Ors v QBE Supreme Insurance Bhd [1990] 1 MLJ 480; [1990] 1 CLJ (Rep) 49, SC (refd)

Karuppiah Chettiar v Subramaniam [1971] 2 MLJ 116, FC (distd)

Lee Kuet Chin v Garai Jelian; Tan Kok Sen (intervenor) [2006] 5 MLJ 342; [2006] 3 CLJ 711, CA (distd)

Lowsley & Anor v Forbes (t/a LE Design Services) [1998] 3 All ER 898, HL (refd)

Mahadevan & Anor v Manilal & Sons (M) Sdn Bhd [1984] 1 MLJ 266; [1984] 1 CLJ (Rep) 230, FC (refd)

Perwira Affin Bank Bhd v Lim Ah Hee @ Sim Ah Hee [2004] 3 MLJ 253; [2004] 2 CLJ 787, FC (refd)

Legislation referred to

Limitation Act 1953 s 6(3)

National Land Code ss 206(3), 334, 336, 337

Rules of the High Court 1980 O 47 r 6(1)

Andrew Chiew (Lee Hishamuddin) for the plaintiffs.
SM Chen (Anad & Noraini) for the applicant-intervener.

Nallini Pathmanathan JC:

[1] Allied Bank Malaysia Bhd ('the applicant-intervener') seeks to set aside a prohibitory order obtained by the plaintiffs dated 4 November 2004 ('the prohibitory order') in respect of the second defendant, Mat @ Matshah bin Ahmad @ Sapuan's property known as HSD 97434 Lot No 363A, Seksyen 41A Daerah Kuala Lumpur ('Lot 363A'). On 24 November 2008, the applicant-intervener obtained an order permitting it to intervene in these proceedings. That order is the subject matter of an appeal in the Court of

Appeal.

BRIEF FACTS

[2] The salient facts relating to this application are best tabulated and are as follows:

4 February 1991	The plaintiffs entered into a consent judgment with the second defendant.
12 November 2003	The plaintiffs obtained leave to execute the judgment out of time against the defendants as six years had lapsed.
21 November 2003	The second defendant entered into an agreement with one Mohd Faizal bin Matshah ('Faizal') for the sale of Lot 363A as well as another piece of land known as Lot 363B. Faizal paid a sum of RM500,000 towards the purchase price of RM1.5m.
17 March 2004	The applicant-intervener granted a loan to Faizal to finance the purchase of Lots 363A and 363B. It was a condition precedent of the loan that Lots 363A and 363B would be charged to the applicant-intervener as security.
4 November 2004	The plaintiffs applied for and obtained the prohibitory order over Lot 363A.
10 November 2004	The prohibitory order was registered.
21 December 2004	The applicant-intervener lodged a private caveat over Lot 363A.
23 December 2004	The second defendant executed a memorandum of transfer in respect of Lot 363A and 363B in favour of Faizal.
4 March 2005	Danaharta issued a redemption statement for RM800,000 in respect of Lot 363A to the applicant-intervener.
21 March 2005	Faizal executed a charge in favour of the applicant-intervener.
23 March 2005	The applicant-intervener paid the sum of RM800,000 to the second defendant's solicitors. The applicant-intervener also requested for the Form 14A, discharge of charge, original issue document of title and duplicate charge.
9 March 2006	Faizal's solicitors delivered the original title, discharge of charge and duplicate charge to the solicitors for the applicant-intervener.
19 April 2006	The plaintiffs filed a summons for direction in the present proceedings for an order to sell Lot 363A which has yet to be disposed of.
30 May 2006	Danaharta forwarded the discharge of charge forms dated 22 March 2006.

6 June 2006	Applicant-intervener discovered the prohibitory order registered against Lot 363A on 4 November 2004 by the plaintiffs. The applicant-intervener was not allowed to register its charge.
14 June 2006	The applicant-intervener filed this application to intervene in these proceedings and set aside the prohibitory order.

[3] The plaintiffs have continued to apply to extend the lifespan of the prohibitory order for terms of six months each on expiry.

THE APPLICANT-INTERVENER'S SUBMISSION

[4] The applicant-intervener submits that the prohibitory order ought to be set aside as the plaintiffs' interest does not prevail over the applicant-intervener's equitable interest or rights as an equitable chargee. In support of this s 334 of the National Land Code is cited:

> 334
>
> In this Chapter 'prohibitory order' means, where land or an interest in land held by a judgment-debtor is to be sold in execution proceedings, an order made pursuant to rules of court by a court of competent jurisdiction prohibiting the judgment-debtor from effecting any dealing therewith or from effecting such dealing therewith as may be specified in the order.

[5] Learned counsel for the applicant-intervener, Ms SM Chen submits that therefore, the prohibitory order only prohibits any dealing with the land so that the status quo of the land can be maintained till the sale of the land. By reason of O 47 r 6 of the Rules of the High Court 1980 the applicant-intervener further submits that by reason of the prohibitory order, the applicant-intervener could not present the transfer and registration of charge and discharge of charge at the relevant land office. Section 337 provides that no sale of and or interest for the purpose of satisfying any judgment debt shall become absolute until it has been confirmed by an order made pursuant to rules of court. The applicant-intervener therefore submits that as the sale and purchase agreement between D2 and Faizal was executed on 21 November 2003, almost one year before the prohibitory order dated 4 November 2004, Faizal acquired an equitable interest over Lot 363A which was not lost by reason of the prohibitory order of 4 November 2004.

[6] The applicant-intervener goes on to submit that although the MOT was duly executed subsequent to the prohibitory order on 23 December 2004 and the redemption sum paid on RM800,000 paid on 23 March 2005 and original title delivered on 9 March 2006, D2 had divested himself of all

beneficial interest in Lot 363A as of the date of execution of the MOT. Once such interest had been divested the applicant-intervener maintains that the plaintiffs as judgment creditors cannot look to the said Lot 363A to satisfy the monetary judgment they obtained. In essence the applicant-intervener maintains that as the second defendant divested himself of all beneficial interest in the land as of the date of execution of the MOT, the second defendant had no further title of that date and therefore the second defendant has no interest in the said Lot 363A. Therefore the plaintiffs cannot sell the land as the second defendant has and had no interest in it from 23 March 2005. In support of this contention the applicant-intervener relies on *Karuppiah Chettiar v Subramaniam* [1971] 2 MLJ 116; *Lee Kuet Chin v Garai Jelian; Tan Kok Sen (intervenor)* [2006] 5 MLJ 342; [2006] 3 CLJ 711.

[7] The applicant-intervener, on the other hand, maintains that it, unlike the plaintiffs, has an interest in the said Lot 363A, namely an equitable charge. Accordingly it is maintained that the court cannot make an order for sale in favour of the plaintiffs as this would adversely affect and prejudice the applicant-intervener's rights gravely in view of the equitable charge it enjoys over the property.

THE PLAINTIFFS' SUBMISSIONS

[8] The plaintiffs, to the contrary maintain that the prohibitory order ought not be set aside as no equitable charge exists in favour of the applicant-intervener. They maintain that subsequent to the registration of the prohibitory order on 10 November 2004 no equitable charge could arise under O 47 r 6(1) of the Rules of the High Court 1980. The plaintiffs submit that Faizal was not in a position to charge Lot 363A as part of an agreement to secure a debt through the debtor's land. This is because, firstly, Lot 363A was charged to Danaharta when the sale and purchase agreement between the second defendant and Faizal was executed. The land was then registered in the second defendant's name. Secondly, the applicant-intervener therefore knew or ought to have known that Lot 363A had to be transferred from the second defendant to Faizal upon completion of the sale and after the charge in favour of Danaharta had been discharged. Thirdly the sale had not been completed. Therefore relying on substantially the same authorities as the applicant-intervener, the plaintiffs maintain that the second defendant did not divest any interest equitable or otherwise over Lot 363A to Faizal. No equitable charge arose.

THE POSITION IN LAW

[9] The primary question for consideration here is whether or not an equitable interest arose in favour of Faizal at the material time, such that he

created a valid and equitable charge in favour of the applicant-intervener. The creation and existence of equitable charges, although not registered or conforming strictly to the provisions of the National Land Code are well-recognised.

[10] In *Mahadevan & Anor v Manilal & Sons (M) Sdn Bhd* [1984] 1 MLJ 266; [1984] 1 CLJ (Rep) 230, the Federal Court dealt with the subject:

> ... Our land law does not recognise a mortgage if it means a mortgage in the sense of English land law whereby the legal estate, ie ownership of the land is transferred to the mortgagee and what is left with the mortgagor is only an equitable right to redeem known as equity of redemption. But our land law certainly recognises a mortgage in the sense of Torrens system, referred to by text written as Torrens mortgage in which the mortgagor retains the legal ownership whilst the mortgagee acquires a statutory right to enforce his security. For the purpose of avoiding confusion, our National Land Code drops the word 'mortgage' and uses the word 'charge' in place of Torrens mortgage. Thus, when s 21(1) of our Limitation Act speaks of a 'mortgage', it must mean a charge as understood and provided for in Part Sixteen of our National Land Code ... That being the case, the words 'other charge on land' in the section, in our view, must mean other types of encumbrances to which the land is subjected. These could be an equitable charge or a lien, statutory or equitable which arises as a result of depositing a title deed with the lender.
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> The decision of the Privy Council in *Haji Abdul Rahman v Mohamed Hassan* certainly does not prevent the creation of an equitable charge. In that case agreement to secure a debt by which the debtor transferred his land to the creditor and upon repayment the land would be transferred back to the debtor was held to be valueless as a transfer or burdening instrument, but was good as a contract. The right so created was not a legal right in the land but only a contractual right. ...
>
> But the subsequent Land Code and the present National Land Code do not contain provisions similar to s 4 of the above quoted Regulation, although the Codes make provisions as to how a charge or a lien could be created. *Examination of court's decisions clearly shows that the courts have resorted to equitable principles and consistently held that an agreement or an agreement to secure a debt in favour of the creditor in respect of the debtor's land creates an equitable charge giving rise to an equitable right in favour of the creditor, although no charge or lien within the provisions of the National Land Code or the previous Code is executed or created* (see *Ngan Khong v Bamah bt Pakah Hamin & Anor* [1935] FMS LR 81; *Arrm Arunasalam Chetty son of Sithambaram Chetty v Teah Ah Poh Trading under the style of Mun Seng Hin Kee* [1937] MLJ 17; *Vallipuram Sivaguru v Palaniappa Chetty* [1937] MLJ 59 and *Mercantile Bank v Official Assignee* [1939] MLJ 196). The basis of this ruling is the very raison d'etre of the court's own existence and the imputed intention of the Legislature. Torrell Ag CJ in *Arunasalam Chetty*'s case said:

... It is the duty of the courts to do justice between parties and unless expressly prohibited by statute law, to give effect to ordinary commercial transactions, such as the advance of money on the security of title deeds ...

... but it is difficult to believe that it was the deliberate intention of the Kedah Legislature by the mere omission to exclude the recognition of the principle of an equitable deposit.

These statements were supported by Whitley AG (SS) who sat in the same case and said:

... the courts will recognise equitable estates and rights except so far as they are precluded from doing so by the statutes.

Raja Azlan Shah J (as he then was) reaffirmed this judicial attitude in *Mercantile Bank Ltd*'s case when he said:

... unless there are express words in the Act, this court is not precluded from giving effect to equitable rights existing between the parties ...

There is, however no provision in the National Land Code prohibiting the creation of equitable charges and liens. The code is silent as to the effect of securities which do not conform to the Code's charge or lien. Therefore equitable charge and liens are permissible under our land law. We, therefore, think that the words 'or other charge on land' in s 2(1) of the Limitation Act must be construed to include equitable charges and liens as well. (Emphasis added.)

Does an equitable charge in favour of the applicant-intervener subsist?

[11] The next question that arises for consideration is whether the applicant-intervener or Faizal enjoys an equitable charge over Lot 363A. In order to ascertain this it is necessary to examine the sequence of events tabulated above. It was evident that the sale and purchase agreement between the second defendant and Faizal was executed on 21 November 2003, well before the grant of the prohibitory order on 4 November 2004 and its registration on 10 November 2004. For the purposes of this application, it is the 10 November 2004 date that is relevant because that is the date when the prohibitory order was registered.

[12] Can it be said that on the date of execution of the sale and purchase agreement, ie 21 November 2003 the purchaser, Faizal acquired the rights and property in Lot 363A? As stated by Gopal Sri Ram JCA (as His Lordship then was) in *Lee Kuet Chin v Garai Jelian; Tan Kok Sen (intervener)* [2006] 5 MLJ 342; [2006] 3 CLJ 711:

... It is settled by high authority '... *That the vendors, after receipt of the full purchase price and surrender of possession of the lands to the appellants (the purchasers) are the bare trustees for the appellants of the said land* ...' per Ong Hock Sim CJ in

Temenggong Securities Ltd & Anor v Registrar of Titles, Johore & Ors [1974] 2 MLJ 45. *Equally a vendor is regarded as having divested himself of all the beneficial interest in his land and vested it in the purchaser only at the time when the memorandum of transfer is executed and the purchase money is paid in full. See Karuppaiah Chettiar v Subramaniam* [1971] 2 MLJ 116. And once there has been a divesting of beneficial ownership by a registered proprietor his creditor cannot look to his land for satisfaction of any money judgment that may have been obtained. That is why you find Ong CJ's (Malaya) saying in *Karuppiah Chettiar v Subramaniam* that:

> It is trite law that when the court orders the sale of a judgment debtor's property it cannot sell more than what the judgment debtor himself is entitled to sell.

... (Emphasis added.)

[13] And in *Chua Hee Hung & Ors v QBE Supreme Insurance Bhd* [1990] 1 MLJ 480; [1990] 1 CLJ (Rep) 49, the Supreme Court held that:

(a) It is clear law that vendors on receipt of the full purchase price and surrender of possession of the lands to be purchased are deemed to be bare trustees for the purchaser.

(b) It is also trite law that when the court orders the sale of a judgment debtor's property, it cannot sell more than what the judgment debtor himself is entitled to sell.

(c) Neither a prohibitory order nor a caveat creates a legal interest in the land.

(d) The appellants' failure to lodge private caveats to protect their beneficial interest in the lands does not advance the case of the respondents in as much as the prohibitory order could not overrule the beneficial interest of the appellants in the properties attached.

(e) As the second defendant had no beneficial interest in the said lands there was nothing which the respondent judgment creditor could legally seize and sell.

[14] On the facts of the instant case it needs to be ascertained at what point the second defendant was divested completely of his beneficial ownership in Lot 363A and as a consequence, when beneficial ownership of the land vested in Faizal. As of the date of the sale and purchase agreement on 21 November 2003, the applicant-intervener argues that the second defendant was divested of such beneficial ownership, particularly as a payment of RM500,000 was said to have been paid. The plaintiffs contend that beneficial ownership of Lot 363A did not pass on the execution of the sale and purchase agreement on 21 November 2003.

[15] It is evident from the foregoing case law that the second defendant would have been effectually divested of his beneficial ownership of Lot 363A upon full payment of the purchase price and execution of the memorandum of transfer. The full purchase price was paid on 23 February 2005 and the memorandum of transfer was executed on 23 December 2004. However prior to both those dates, on 10 November 2004, the prohibitory order was registered.

[16] The effect of a prohibitory order is specified in s 336 of the National Land Code and specifies that it prohibits the registration, endorsement or entry on the document of title of any instrument of dealing executed by or on behalf of the proprietor, subject to sub-s (2) and (3). Neither of those subsections are applicable here. As such, as of 10 November 2004, the second defendant was precluded from further dealing with Lot 363A, by reason of the joint effect of s 336 of the National Land Code as well as the provisions of O 47 r 6(1) of the Rules of the High Court 1980.

[17] It follows from the foregoing sequence of events that as of 10 November 2004, the date of registration of the prohibitory order, the second defendant had not been divested of his beneficial ownership of Lot 363A. The second defendant was not a bare trustee merely holding on to the title to the property for and on behalf of Faizal. This is because as of that date, the full purchase price had not been paid, and the memorandum of transfer had not been executed. As such title to Lot 363A remained with the second defendant. If title remained with the second defendant, it could not pass to Faizal after 10 November 2004 by reason of the prohibitory order.

[18] As title could not pass to Faizal, he was not in a position to charge the property in consideration of the loan granted by the applicant-intervener. In short, no equitable charge could be created by Faizal in favour of the applicant-intervener as he could pass no better title than he himself possessed. And at that point in time he did not have or possess title to Lot 363A.

[19] The instant case is distinguishable from the cases of *Lee Kuet Chin v Garai Jelian; Tan Kok Sen (intervenor)* as well as *Karuppaiah Chettiar v Subramaniam* in that in those cases title to the disputed property had passed to the purchaser such that the vendor was merely a bare trustee. Having divested himself of all beneficial ownership in the land, his judgment creditors could no longer look to the property for satisfaction of the debt. In the instant case however, the facts of the case disclose that there was no divesting of beneficial ownership by the time the prohibitory order was registered. As such the second defendant remained the proprietor of Lot 363A. Faizal could not therefore create any form of charge in favour of the applicant-intervener and thus no such equitable charge subsists. As no

A equitable charge subsists in favour of the applicant-intervener the contention that the applicant-intervener takes prior to the plaintiffs must fail.

[20] Ms SM Chen sought to contend further that the provisions of s 206(3) of the National Land Code were applicable. This section which deals with the need for proper instruments of dealing, duly registered stipulates:

B

> (3) Nothing in subsection (1) shall affect the contractual operation of any transaction relating to alienated land or any interest therein.

C

[21] It was submitted that as such the sale and purchase transaction was not affected by the non registration of that transaction. This argument did not appear to deal with the problem in issue as outlined above, and did not possess merit either. It did not address the effect of the prohibitory order on the attempted dealings in Lot 363A by the second defendant.

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[22] It was further submitted that notwithstanding that the purchase price was paid subsequent to the registration of the prohibitory order, Faizal nonetheless enjoyed an equitable interest in the property. The court sought from learned counsel for the applicant-intervener, authorities on this point, but was advised that there were none. The foregoing cases referred to above, deal with the issue comprehensively. In summary it appeared to this court that as the prohibitory order was registered prior to the payment of the full purchase price and execution of the memorandum of transfer, the second defendant, by virtue of the prohibitory order was precluded from dealing with the said) property, including the transfer of that property to any other party. The second defendant remained the registered proprietor at the point in time when the prohibitory order was registered because the full purchase price had not been paid, and the memorandum of transfer had not been executed. As such Faizal had no interest in the land and could neither pass nor create an equitable charge in favour of the applicant-intervener. In these circumstances the applicant-intervener enjoys no prior equitable rights precluding the plaintiffs from looking to Lot 363A to satisfy their judgment debt.

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[23] This ground to set aside the prohibitory order is therefore without merit and fails.

INTEREST

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[24] The second point relied upon by learned counsel for the applicant-intervener is that of interest. It was submitted that the plaintiffs are claiming interest for a period of more than six years in respect of the

judgment debt, thereby contravening s 6(3) of the Limitation Act 1953. Interest appears to have been claimed for more than 13 years. This, the plaintiff submitted was unlawful. The plaintiffs on the other hand contended that s 6(3) is inapplicable in that the said section deals with an action on a judgment rather than execution. In any event it was submitted in the alternative that if s 6(3) applies the court has power to amend the prohibitory order and the writ of seizure and sale and limit the interest to six years so that it would not be necessary to set aside the prohibitory order altogether.

[25] The relevant case on point would appear to be *Perwira Affin Bank Bhd v Lim Ah Hee @ Sim Ah Hee* [2004] 3 MLJ 253; [2004] 2 CLJ 787. In the course of discussing s 6(3) and adjudicating that a 'bankruptcy proceeding' is an action upon a judgment within s 6(3) of the Limitation Act (which is not relevant here), the Federal Court discussed the issue of interest beyond a period of six years in conjunction with the provisions of the Limitation Act 1953:

> Furthermore, we should look at the scheme of our Limitation Act 1953. Where, as has been pointed out, the limitation of action is six years, the provision is silent on the limitation period for claiming arrears of interest. The reason is clear: it is not necessary because it is automatically limited to six years. Where the limitation of action is 12 years as in s 21 (and s 6(3)), the limitation period for claiming arrears of interest is six years, (see *Ernest Cheong* for the meaning of 'arrears of interest'). *So, the limitation period for claiming arrears of interest is consistent, ie six years in all cases. The exception is execution proceedings. But first of all, it is 'execution' not an 'action'. Secondly if execution is to be done after six years leave of court must be obtained. That perhaps, is the reason for the requirement of leave, leave may not be granted at all or it may be granted with condition attached, eg, the arrears of interest may be limited to six years also. On these grounds I am of the view that the whole subsection should be read together and not to be split to first and second limb and to read them disjunctively ...* (Emphasis added.)

[26] The instant case deals with execution and not an action upon a judgment. Notwithstanding this as stated above, there is a requirement for leave of court to be obtained where execution is done after six years. In such an instance the court may properly limit the arrears of interest to be claimed. In the instant case, arrears of interest should be limited to six years, as the judgment was executed after a lengthy period of more than 12 years. In the circumstances the court orders that the prohibitory order and the writ of seizure and sale be amended so as to limit the interest to six years (see *Lowsley & Anor v Forbes (t/a LE Design Services)* [1998] 3 All ER 898). However this

A in itself does not comprise sufficient basis to set aside the prohibitory order altogether. The application to set aside the prohibitory order is therefore dismissed with costs.

Application dismissed with costs.

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Reported by Kohila Nesan

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